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Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

October Term, 1985

RICHARD THORNBURGH, *et. al.*,
Appellants,
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
Appellees.

EUGENE F. DIAMOND, *et al.*,
Appellants,
v.
ALLAN G. CHARLES, *et al.*,
Appellees.

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae
2 World Trade Center
Suite 45-08
New York, New York 10047
(212) 488-7511

ROBERT HERMANN
Solicitor General
Counsel of Record

ROSEMARIE RHODES
Assistant Attorney General
in Charge, Civil Rights Bureau

LAWRENCE S. KAHN
SANFORD M. COHEN
MARTHA J. OLSON
Assistant Attorneys General
Of Counsel

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Interest of *Amicus Curiae*

Robert Abrams, as Attorney General of the State of New York, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

Since 1970, the State of New York has recognized that the right of privacy incorporates the right of a woman to choose to terminate her pregnancy up to the point of viability, subject to reasonable restrictions calculated to protect the health and safety of the woman. *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972); N.Y. Penal Law § 123.05(3). This Court likewise recognized, in 1973, that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

If *Roe* v. *Wade* were to be overruled, as urged by the Solicitor General,* and New York were to adhere to its tradition of recognizing the right of a woman to choose to have an abortion, New York and other states choosing to uphold such a right would be faced with meeting an enormous demand for the service from out-of-state residents. The magnitude of this demand would be extraordinary, given the wide acceptance of and reliance upon abortion since *Roe v. Wade* was decided.

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* The brief submitted by the Solicitor General as *amicus curiae* will be cited as "S.G. at ——."

In explicitly recognizing that the right to choose to have an abortion is implicit in the right of privacy protected by our Constitution, this Court guaranteed that its exercise, as with the exercise of other constitutionally protected rights, would not be dependent upon the vicissitudes of political controversy. *See Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). The decision whether to obtain an abortion, as with other deeply personal choices regarding privacy and reproductive decisions intertwined with religious and moral beliefs, is precisely the type of right most in need of such explicit constitutional protection. New York has aggressively protected its citizens from attacks upon these rights in the past, and therefore submits this brief *amicus curiae* in response to that submitted by the Solicitor General urging this Court to overrule *Roe* v. *Wade*.

Statement of the Cases

In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, the Court of Appeals for the Third Circuit held unconstitutional sections of a Pennsylvania law requiring that the method of abortion used be one that would most likely result in a live birth, even if it would cause greater (though not significantly greater) risk to the mother; that a second doctor be present for all post-viability abortions even if a medical emergency dictates an immediate abortion; that certain information be provided to a patient before an abortion is performed, for the purpose, as the court found, of dissuading the woman from having an abortion, regardless of whether the woman's physician deems the information relevant to her decision; and that fa-

cilities providing abortion services file detailed reports subject to public disclosure. The court also enjoined operation of a provision that required a minor seeking an abortion to obtain parental consent or a court order, on the ground that no safeguards had been adopted to ensure that the judicial alternative would be expeditious and would protect the minor's confidentiality.

In *Diamond* v. *Charles*, No. 84-1379, the Court of Appeals for the Seventh Circuit held unconstitutional a section of Illinois law that made it a felony to fail to conform to a specified standard of care in performing an abortion, and thereby to cause the death of a viable fetus, finding that the provision failed to afford due deference to the viability determination of the attending physician and was impermissibly vague. A similar provision as to "possibly viable" fetuses was held unconstitutional because it ran afoul of *Roe* v. *Wade*'s holding that the State does not have a compelling interest in protecting fetuses unless they are actually viable. The Seventh Circuit also struck down a requirement that physicians inform women that certain birth control methods are "abortifacients," defined as any substance or device known to cause fetal death. A fetus is in turn defined to include a fertilized cell, thus making an intrauterine device, and other common means of birth control, abortifacients. The lower court held that the statute impermissibly imposed the State's theory of when life begins upon the physician and the patient.

None of the parties in these two cases urged that *Roe* v. *Wade* be overruled. Indeed, both cases have been consistently briefed and argued within the framework established by *Roe* v. *Wade* and subsequent cases. *E.g., City of Akron*

v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The Department of Justice is not a party to either case. Nonetheless, the Solicitor General has taken the extraordinary step of using these two cases to urge the Court to perform an unprecedented *volte-face*. The Government asks that the right to choose to have an abortion be repudiated and that an independent right of privacy, on which the right of abortion is based, be eliminated from the freedoms protected by our Constitution.

Summary of Argument

The Solicitor General's arguments are without merit. They ignore a firmly established line of precedent protecting our rights to be left alone by government, to choose how to conduct our own lives, and to decide for ourselves when and whether to marry or to conceive or bear children. *E.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Moreover, they disregard the important principle of *stare decisis*, a principle recognized by this Court in this very context just two years ago. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Finally, they ignore the very real likelihood of social and political chaos should this Court overrule *Roe* v. *Wade*.

ARGUMENT

Only twelve years ago, this Court held that the right of personal privacy—which finds its doctrinal sources in decisions dating back to the nineteenth century—"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court has adhered to this principle in no fewer than twelve cases in the ensuing years.* Because this Court has consistently and repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

The reasons for adhering to *stare decisis*, generally and in this context, are manifold. Among them are

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Even as to constitutional questions, "any depar-

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* *See, City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

ture from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, —— U.S. ——, ——, 104 S.Ct. 2305, 2311 (1984). For "in a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem* v. *Helm*, 463 U.S. 277, 311 (1983) (Burger, C.J., dissenting), *quoting City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. at 419-20.

Undoubtedly, the passions, both moral and political, which surround the abortion debate have motivated some to counsel the Court to depart from recent decisions. Passionate debate, however, attends many issues which implicate constitutional concerns, and its tenacity surely cannot be an acceptable basis for abjuring reasoned adherence to announced principles. Only by "circumspect observance" of the principle of *stare decisis* "can the wisdom of this Court as an institution transcending the moment . . . be brought to bear on the difficult problems that confront [it]." *Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting). *See Oregon* v. *Kennedy*, 456 U.S. 667, 691-92 n. 34 (1982) (Stevens, J., concurring).

Indeed, this Court only two years ago found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*." *Akron*, 462 U.S. at 419-20 n.1. Among them were the special consideration afforded the issues in *Roe*, and the repeated adherence in subsequent cases to the basic principle there announced. *Id.* No doctrinal development has appeared since *Roe* v. *Wade*, much less *Akron*, that in any sense diminishes the Court's conclusion that the right to privacy encompasses the right of a woman to choose whether to terminate a pregnancy.

Each of the so-called "textual, historical, and doctrinal" flaws of *Roe* v. *Wade* decried by the Solicitor General, S.G. at 2, was identified by the dissenters in *Roe* and rejected by the Court. Thus, it was argued that the historical coincidence of the passage of laws criminalizing abortion with the passage of the Fourteenth Amendment supports the contention that the Amendment was not intended to restrict such legislative action, 410 U.S. at 174-77 (Rehnquist, J., dissenting); that the right of privacy, as previously identified by the Court, had no application in the abortion area, *id.* 172-73; and that barring state legislatures, as a matter of constitutional law, from entering into the area of procreative choice, in the absence of textual support, amounted to judicial legislation and usurpation of majoritarian prerogatives, *id.*; *Doe* v. *Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting). The Solicitor General brings nothing new to the arguments, and cites not one case decided since *Roe* in support of them.

Since *Roe* v. *Wade*, the Court has been called to delineate more fully the fundamental right to choose an abortion. In varying factual circumstances, it has had to weigh the states' competing interests in protecting maternal health and in the future health of the fetus. The continuing need for the Court to furnish guidance in this area does not, however, argue for a doctrinal retraction of *Roe* v. *Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves difficult tasks of redefinition and line drawing. Obviously, individual rights cannot be jettisoned merely because their application in varrying contexts may be difficult. To cite but one example, for more than a generation this Court has wrestled with the question of religious observances in the public schools, *see Wallace* v.

Jaffree, —— U.S. ——, 105 S.Ct. 2479 (1985), without retreating from the principles announced in *Engel* v. *Vitale*, 370 U.S. 421 (1962).

Both the states and countless individuals have relied upon the rights secured by *Roe* v. *Wade* and its progeny in ordering their affairs and lives. Based on these decisions, states have attempted to establish a uniform framework within which health planning and regulatory decisions can be made. *See e.g., Westchester Women's Health Organization, Inc.* v. *Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by this Court); *Roman Catholic Diocese* v. *New York State Department of Health*, —— A.D.2d ——, 490 N.Y.S.2d 636 (3d Dept. 1985) (New York relied on *Akron* in deciding to approve the addition of abortion services to two family planning out-patient clinics); *Schulman* v. *New York City Health & Hospitals Corp.*, 38 N.Y.2d 234 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe* v. *Wade*).

The overruling of *Roe* v. *Wade* would impose an extraordinary burden upon those states which would continue to allow women to choose to terminate their pregnancies in the face of decisions by other states not to do so. For example, when New York amended its penal law in 1970 to permit licensed physicians to provide abortion services for any consenting woman less than twenty-four weeks pregnant, N.Y. Penal Law § 125.05(3), the State was flooded with women seeking this service.* The magnitude of the burden

* During the first fifteen months after this liberalized bill became effective, 64.5 percent of the abortions performed in New York City were performed on non-residents. Guttmacher, *The Genesis of Lib-*

(footnote continued on next page)

that would be imposed upon New York should *Roe* v. *Wade* be rejected would be all the greater than it was in 1970, given the increased acceptance of abortion in our society and the increased demand for it since *Roe* v. *Wade* was decided.

Individuals have relied upon the right of privacy, which encompasses the right to choose to have an abortion, in planning their families and controlling their destinies. If *Roe* v. *Wade* is overruled, as the Solicitor General urges, and the fundamental right of privacy called into question, an individual's ability to plan when to have children, and to insure that each child is a wanted child, will be left largely to chance, depending upon the state in which one resides, the latest election or whether one is rich or poor.

As with the school prayer issue, the continuing controversy over the right to an abortion makes it clear that such an important right cannot be left to shifting political majorities.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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eralized Abortion in New York, 23 Case W. Res. L. Rev. 756, 766 (1972). During the first twelve months alone, approximately 55,000 women from eight states alone—New Jersey, Ohio, Michigan, Illinois, Pennsylvania, Florida, Massachusetts and Connecticut—traveled to New York City to obtain legal abortions. *Id.*

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 638; *see Engel* v. *Vitale*, 370 U.S. at 429-30.* Any decision undercutting *Roe* v. *Wade* and its underlying principles would make it impossible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs . . . , are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health* v. *Florida Nursing Home Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (footnote omitted).

In deciding *Roe* v. *Wade*, the Court confronted the need to give meaning to the concept of due process, a concept that "has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Aware that "liberty" is not merely "a series of isolated points pricked out" in terms of guarantees of the Bill of Rights,

* The New York Legislature, for example, repealed New York's abortion statute in 1972, but then Governor Rockefeller vetoed the repeal, reminding the Legislature of the Report of the Governor's Commission Appointed to Review New York State's Abortion Law (March 1968), which found that "the then-existing, 19th century, near-total prohibition against abortion was fostering hundreds of thousands of illegal and dangerous abortions. . . . discriminating against women of modest means. . . . , promoting hypocrisy and, ultimately, human tragedy. . . . I can see no justification now for repealing this reform and thus condemning hundreds of thousands of women to the dark age once again." Governor's Veto Messages, 1972, *reprinted* in N.Y.S. Legis. Annual-1972, at 423. Significantly, Governor Rockefeller noted,

> the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Id.

id., at 543, the Court proceeded to fill out the "vague contours of the Due Process Clause," *Rochin* v. *California*, 342 U.S. 165, 170 (1952),* mindful that its judgment could not be rooted in "personal and private notions," and that it must exercise its judgment "upon interests of society pushing in opposite directions." *Id.*, at 171.**

The constitutional terrain described in *Roe* v. *Wade* is an area in which the Court, in a series of decisions, long ago marked out a "zone of privacy created by several fundamental constitutional guarantees," *Griswold* v. *Connecticut*, 381 U.S. at 485, in matters relating to child rearing, mar-

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* Though confessing that the words of the Due Process Clause "do not interpret themselves," S.G. at 24, and that the provision does not merely prohibit the government from "actually taking hold of a person, as to confine him, without fair procedures," S.G. at 25, the Solicitor General would limit the meaning of liberty to those protections expressly guaranteed by the Bill of Rights. This view of the Due Process Clause, fully accepted by only one member of the Court, *see Griswold* v. *Connecticut*, 381 U.S. at 507-27 (Black, J., dissenting), was rejected even by the Justices dissenting in *Roe* v. *Wade*. *See Griswold* v. *Connecticut*, 381 U.S. at 502-07 (White, J., concurring); *Roe* v. *Wade*, 410 U.S. at 172-73 (Rehnquist, J., dissenting).

** It is neither illogical nor "demoralizing," S.G. at 25, that the Court, at the same time it has refrained from invalidating legislation aimed at curing social evils arising out of industrial life, *e.g. West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), has shown special solicitude for *personal* freedom "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). This responds to an observable distinction between state intrusions upon such "economic freedoms" as the ability to pay substandard wages and state intrusions into time-honored, intimate relationships and decisions. Thus, it has long been recognized that "in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

riage and procreation.* A repudiation of the principles announced in *Roe* v. *Wade* would therefore also remove the constitutional girders of some of this Court's most important decisions in this century.

In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down under the Due Process Clause a statute that prohibited the teaching of foreign languages to children. It found that the state had intruded into a protected liberty interest because the legislation "materially . . . interfere[d] . . . with the power of parents to control the education of their own." *Id.* at 401. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a state law requiring parents to send children to public, rather than parochial, school because the legislation "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control." *Id.* at 534-35. These decisions recognized that the Due Process Clause protects a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158,

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* As this Court stated in *Roe* v. *Wade*, 410 U.S. at 152:

> In a line of decisions . . . going back perhaps as far a *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968); *Katz* v. *United States*, 389 U.S. 347, 350 (1967); *Boyd* v. *United States*, 116 U.S. 616 (1886); *see Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment; *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

166 (1944);* *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

So, too, has the Court scrutinized and invalidated state legislation encroaching on the ability of citizens to marry. *Loving* v. *Virginia*, 388 U.S. 1 (1967). In *Loving*, the Court reversed convictions under a statute that made inter-racial marriage a criminal offense. While the Court held that the statute was invalid because it violated the "central meaning of the Equal Protection Clause," *id.* at 12, the Court relied equally on the Due Process Clause when it held the statute invalid, finding that it deprived persons of the freedom to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* *See Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978).

In *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), the Court struck down a state statute authorizing the sterilization of repeated felons, characterizing the ability to procreate as "one of the basic civil rights of man." *Id.*, 316 U.S. at 541.** In *Griswold*, the Court recognized that, just as the state cannot terminate the right to bear children, it cannot invade marital relationships to require couples to bear children by

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* Contrary to the view of the Solicitor General, S.G. at 29, the state regulation under review in *Prince* involved not only restriction on freedom of religion, but, as the Court observed, encroachment on the separate and distinct "rights of parenthood." 321 U.S. at 166.

** *Skinner* cannot be characterized as only an equal protection case. It is an axiom of equal protection analysis that a statutory classification will not be subjected to the searching scrutiny applied in *Skinner* unless the classification is "invidious" or impinges on a fundamental right. *Plyer* v. *Doe*, 457 U.S. 202 (1982). The Court recognized that the classification of different crimes selected by the state in *Skinner* raised "no substantial federal question." 316 U.S. at 540. Rather, it was because the statute derived certain felons, not rationally distinguishable from others, of a "basic liberty" that it was held invalid.

denying them the use of contraceptives. 381 U.S. at 479-80. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), recognized that the right of privacy guaranteeing the freedom to use contraceptives as a means to control if and when to bear children inheres not only in the marital relationship:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child or beget a child. *See Stanley* v. *Georgia*, 394 U.S. 557 (1969). *See also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29 (1905).

405 U.S. at 453-54 (footnote omitted).

Thus, prior to *Roe* v. *Wade*, the Court had determined that unwarranted intrusions by the state into personal decisions about whom to marry, how to raise and educate children, and when or whether to bear children were proscribed by the guarantee of the Fourteenth Amendment: "nor shall any State deprive any person . . . of liberty . . . without due process of law."

Viewed in this context, it is plain that the Court did not "leap to its conclusion," S.G. at 27, that the right of a woman to choose whether to terminate her pregnancy was encompassed within the right of privacy guaranteed by the Due Process Clause. Rather, the Court carefully considered the rational involved in the cases preceding *Roe* and other factors before it reached its conclusion that the Fourteenth Amendment restricts state action that forbids abortion. *Roe* v. *Wade*, 410 U.S. at 153.

This Court has shown unwavering adherence to its historical reading of the right of privacy in the cases involving abortion since *Roe* v. *Wade*, as well as in matters bearing on conception and family relationships. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (invalidating state laws burdening the right to marry); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening the woman's decision to bear a child). Because *Roe* v. *Wade* falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the Due Process Clause under which liberty is a "continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints," *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting), *stare decisis* and the fundamental principles of adjudication of constitutional rights require its reaffirmance in the cases now before this Court.*

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* For the reasons set forth in the opinions of the Third and Seventh Circuits, this Court should affirm the *Thornburgh* and *Diamond* judgments.

Conclusion

For the foregoing reasons, the arguments of the Department of Justice should be rejected, the principles of *Roe* v. *Wade* reaffirmed, and the judgments of the courts below affirmed.

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Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae
2 World Trade Center
Suite 45-08
New York, New York 10047
(212) 488-7511

ROBERT HERMANN
Solicitor General
Counsel of Record

ROSEMARIE RHODES
Assistant Attorney General
in Charge, Civil Rights Bureau

LAWRENCE S. KAHN
SANFORD M. COHEN
MARTHA J. OLSON
Assistant Attorneys General
Of Counsel